DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-203265 DATE: July 20, 1982

MATTER OF: Gulton Industries, Inc., Engineered Magnetics Division

DIGEST:

1. Protest against exercise of option is appropriate for GAO resolution even though option exercise was part of agreement between Navy and awardee to settle awardee's prior protest of and civil litigation against option exercise under different contract. Since civil litigation/settlement raised matters related exclusively to different contract, the United States District Court never had before it issues raised in present protest. Furthermore, the protester is not objecting to the exercise of the option pursuant to the settlement, but rather, the protester argues that the manner in which the option was exercised went beyond the scope of the settlement agreement.

2. Although protests against contract modifications are usually matters of contract administration which GAO does not review, we will consider protests which contend that a modification went beyond the scope of the contract and, therefore, was an unjustified sole-source award.

3. Protest against exercise of option is timely when filed within 10 working days after protester was informed of basis for protest. Even though protester knew more than 10 working days before filing protest that option would be exercised, protester was not required to file "defensive" protest in anticipation of improper actions by contracting agency

related to option exercise. The 10-day period runs from date protester was first informed of specific terms of option exercise which form bases for protest--that option was not exercised in accord with option provision in contract nor in accord with applicable regulations.

4. Protest issues raised for first time in protester's comments on agency report on timely filed issues are untimely where filed more than 4 months after protester was given documentation which should have informed protester of bases for later-raised issues.

5. Protest that Navy improperly issued modification exercising option to effect sole-source award is denied. Even though the modification changed technical specifications so that the item procured under option was not exactly the same item as procured under the basic contract, changes were relatively minor in nature, were made under changes clause of contract, and were within scope of basic contract. Therefore, competitive procurement statutes have not been circumvented.

6. Protest that option was improperly exercised is denied since contracting agency relied upon recent informal market survey of the only known producers of item in determining that option price was best available price. Furthermore, agency considered urgency of requirement due to precariously low supply and fact that incumbent could give accelerated delivery under option. Finally, agency considered fact that option exercise would be part settlement of costly, disruptive litigation effort. Accordingly, we cannot find contracting agency's determination to exercise option to be unreasonable.

Gulton Industries, Inc., Engineered Magnetics Division (Gulton), protests against a modification issued by the Department of the Navy, Ships Parts Control Center (SPCC), under contract No. N00104-81-C-1791 for the supply of 51 contaminated fuel

detector (CFD) units by the contractor, Telectro-Mek, Inc. (TMI). The modification called for production of an additional 51 CFD's pursuant to the option provision of the contract. Gulton contends that the option was not exercised in accordance with the option provision and that the Navy did not properly determine that exercise of the option represented the most advantageous method of fulfilling the Government's needs as required by Defense Acquisition Regulation (DAR) § 1-1505(c)(iii) (1976 ed.). Accordingly, Gulton argues that this modification amounted to an improper sole-source award to TMI.

We deny the protest in part and dismiss it in part as untimely filed.

Specifically, Gulton argues that the option was not properly exercised because the 51 additional CFD's were to be manufactured in accordance with military specification MIL-D-22612 revision "C" rather than military specification MIL-D-22612 revision "B" as required under the basic contract. Thus, the units required under the option will include "additional performance and equipment features which make it a potentially more costly requirement" than revision "B" units. In fact, Gulton points out that the actual option price per unit is more than the price specified in the contract for the option quantity. Further, the option as awarded requires delivery at an accelerated rate over the delivery rate originally required for the option units by the contract's option provision and the exercise of the option occurred after the option period had already expired. Also, Gulton contends that the Navy did not conduct a market survey to determine whether a better price than that contained in the option could be obtained as required under DAR §§ 1-1505(c)(iii) and 1-1505(d)(2).

Background

In June 1980, SPCC issued invitation for bids (IFB) No. N00104-80-B-1104 for supply of 51 CFD's. TMI was the low bidder with a price of $3,087 per unit or $3,022 per unit with waiver of first article testing. Gulton protested to our Office prior to bid opening contending that the procurement should be negotiated rather than advertised, and we denied Gulton's protest. Gulton Industries, Inc., Engineered Magnetics Division, B-199390, November 3, 1980, 80-2 CPD 334. Contract No. N00104-81-C-1791 (No. 1791) was awarded to TMI on November 11, 1980.

It contained an option provision for 100 percent of the basic quantity (51 units) at a price of $3,276 per unit.

On October 3, 1980, SPCC orally solicited TMI and Gulton for the urgent supply of 110 CFD's and both firms submitted proposals. As a result, contract No. N00104-81-C-1747 (No. 1747) was awarded to Gulton at a unit price of $3,595, with an option for 100 percent of the basic quantity (100 units) at a unit price of $3,595.

In January 1981, SPCC contacted both TMI and Gulton and requested quotations for varying quantities of CFD's. Gulton offered to increase the option quantity under contract No. 1747 to 250 percent of the basic quantity and to lower its per unit price to $3,095. In February 1981, SPCC modified Gulton's contract increasing the option quantity to 250 percent and exercising the option for 231 units at a per unit price of $3,095. On March 18, TMI offered to reduce its option price under contract No. 1791 to $2,950 per unit. SPCC accepted TMI's offer and modified TMI's contract on April 1. TMI was not advised of the exercise of Gulton's option for 231 units under contract No. 1747 until March 24. TMI filed a protest with our Office on April 1 and, on April 6, filed with the United States District Court for the District of Columbia for a temporary restraining order and a preliminary injunction.

On April 7, 1981, the Navy and TMI stipulated that: (1) TMI would withdraw its motion for a temporary restraining order; (2) the Navy would take no action under the modification to Gulton's contract which would prejudice TMI; (3) the Navy would review the Gulton contract and enter into discussions with TMI; and (4) on or before April 27, 1981, the Government would either cause a stipulation of settlement to be entered or would file an opposition to plaintiff's motion for a preliminary injunction. In accordance with this stipulation, a stop-work order was issued to Gulton for the option quantities. Representatives of TMI and the Navy met several times and worked out a settlement which resulted in TMI withdrawing its protest and moving for dismissal of the matters before the district court.

A final settlement agreement was filed with the district court on April 27, 1981, which provided for: (1) terminating 121 CFD's from Gulton's contract (No. 1747) (this represented the number of CFD's which had been added

to the original option for 110 units by the February modification); (2) exercising the option in TMI's contract (No. 1791) for 51 units; and (3) readvertising the remaining requirement for 70 units. As a result of the settlement, the stopwork order issued to Gulton was rescinded to permit Gulton to proceed with production of 110 units under the option and a termination for convenience was issued to Gulton for 121 units on April 29. The option in TMI's contract (No. 1791) for 51 additional units was exercised by contract amendment issued on April 29. Gulton filed its initial protest in our Office on May 12, 1981.

Jurisdiction

TMI contends that, since the TMI option was exercised as part of an agreement negotiated to settle both a bid protest and litigation before a United States District Court, our Office should decline to review this protest. TMI argues that Gulton could have intervened in TMI's earlier protest and in the civil litigation. Since Gulton chose not to intervene in either matter, we are urged not to become "a forum for after-the-fact attacks" on such settlements. We do not agree.

It is GAO policy not to decide a bid protest where the material matters before us are also before a court of competent jurisdiction. See Norton Company, Safety Products Division, 6 Comp. Gen. 1 (1981), 81-1 CPD 250. However, this settlement was negotiated between the Navy and TMI on matters relating exclusively to TMI's charges that the Navy had improperly awarded an option quantity to Gulton. Therefore, the United States District Court never had before it the issues raised by Gulton here pertaining to the allegedly improper manner in which the Navy exercised the option under TMI's contract. Essentially, Gulton is not objecting to the exercise of the option pursuant to the settlement, but rather, Gulton argues that the manner in which the option was exercised went beyond the scope of the settlement agreement because the Navy changed the specifications, accelerated delivery, and increased the price it would pay. Therefore, Gulton's protest of these matters is appropriate for our review.

While we do not generally consider protests against contract modifications unless it is alleged that the modification went beyond the scope of the contract and

should have been the subject of a new procurement, this is essentially the subject of Gulton's protest and, therefore, the matter is appropriate for our consideration. Memorex Corporation, 61 Comp. Gen. 23 (1981), 81-2 CPD 334.

Timeliness

Both the Navy and TMI argue that Gulton's entire protest is untimely because Gulton knew that TMI and the Navy were in the process of negotiating the settlement of TMI's protest and court action. Gulton apparently kept in close contact with Navy officials about this matter and, on April 16 or 17, Gulton's attorney was informed that a settlement was imminent. At that time, Gulton was told that, as part of the settlement, its own contract (No. 1747) would be terminated to the extent of 121 units out of the 231 additional units ordered from it, that 51 of those units would be awarded to TMI under its contract (No. 1791) option, and that the remaining 70 units would be competitively resolicited. Accordingly, TMI and the Navy contend that Gulton knew, or should have known, its bases for protest by April 16 or 17 when it was told the general outline of the settlement agreement. The Navy reports that, on April 20 or 21, a Gulton representative told Navy officials that Gulton "did not like the settlement." Thus, the Navy argues that it was clear that Gulton knew its grounds for protest before April 20 or 21. The Navy and TMI argue that, once Gulton knew that the Navy was going to terminate its contract with Gulton and exercise its option with TMI, Gulton had to protest within 10 working days under section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 21 (1982). Since Gulton's initial protest was filed on May 12--more than 10 working days after the April 16 or 17 phone conversation wherein Navy officials informed Gulton's attorney that a settlement had been achieved--the Navy and TMI conclude that the entire protest is untimely.

The differing specifications, price change, and lack of market survey were raised by Gulton on May 12 when the initial protest was filed in our Office. While Gulton's attorney knew on April 16 or 17 that representatives of the Navy and TMI had agreed to

settle, and a Gulton representative might have expressed the firm's displeasure with the settlement on April 20 or 21, we do not find that Gulton was required to protest within 10 days of either of these events. Even though Gulton knew that the settlement had been worked out, there is no evidence that Gulton had been told the details of that agreement. Furthermore, while Gulton might have expressed displeasure with the settlement, that fact alone does not show conclusively that Gulton knew the above-noted bases for its protest. However, Gulton had a right to expect that the Navy would exercise the option properly. Thus, Gulton could have assumed that the actual exercise would be in accord with the contract's option provision and that the Navy would follow the appropriate regulations. We do not require prospective protesters to file "defensive" protests before actual knowledge that a basis for protest exists or in anticipation of improper actions by the contracting agency. See Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486, for a summary of our position on "defensive" protests. Here, the termination of Gulton's contract and exercise of TMI's option did not occur until April 29, and Gulton was not informed of the details of TMI's option award until some time afterward. Accordingly, we find the above-listed bases of protest to be timely filed, and the issues presented therein are for consideration on their merits.

However, the remaining allegations (pertaining to accelerated delivery under the option and the period in which the option could be exercised) were first raised by Gulton in its September 25 comments on the Navy's report. Though Gulton's initial filing did indicate that Gulton believed the exercise of the TMI option was not in accord with the option provision of the TMI contract, Gulton's initial filing directed itself only to the change in specifications and resultant higher cost for option units. Nowhere in the initial protest letter did Gulton mention the accelerated delivery or the time period in which the option was viable. Gulton was sent a copy of the TMI contract and the modification which was used to exercise TMI's option. These documents were received by Gulton on May 15. However, Gulton did not raise these allegations until September 25 when it commented on the Navy's report on the initial protest allegations. Since these allegations were not raised within 10 days of the date Gulton received the TMI

contract and modification which revealed these bases for protest, they are untimely under section 21.2(b)(2) of our Procedures. 4 C.F.R. § 21.2(b)(2).

Where, as here, a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements. See John J. Moss, B-201753, March 31, 1981, 81-1 CPD 242. Our Bid Protest Procedures are designed to give protesters and interested parties a fair opportunity to present their cases, with only minimal, if any, disruption to the orderly and expeditious process of Government procurement. See Bird-Johnson Company--Request for Reconsideration, B-194445.3, October 14, 1980, 80-2 CPD 275. They do not contemplate a piecemeal presentation or development of protest issues. See Radix II, Inc., B-186999, February 8, 1977, 77-1 CPD 94.

Gulton points out that it did charge in its May 12 filing that SPCC had awarded the option to TMI in contravention of the contract option provision. Gulton argues that the later-raised allegations are merely support for a legal issue filed in a timely manner. We do not agree.

In Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412, we stated that we generally will consider later-filed materials and/or arguments which merely provide further support for an already timely protest. The Kappa Systems rule, however, presumes a timely initial protest which merely lacks detail. It is not designed to permit a protester to toll our filing requirements by reserving the right, in effect, to raise new grounds of protest subsequently if the firm is not satisfied with the contracting agency's response to its otherwise timely protest. See Pennsylvania Blue Shield, B-203338, March 23, 1982, 82-1 CPD 272.

In our view, these later-raised issues fall within the Pennsylvania Blue Shield category. Since Gulton waited more than 4 months to file these allegations after receiving the documents which put it on notice of these alleged irregularities, they are untimely and, therefore, are dismissed.

Change in Technical Specifications

Contract No. 1791 with TMI originally required TMI to deliver to SPCC 51 CFD's which were to conform to military specification MIL-D-22612 revision "B" at a price of $3,087 per unit (without waiver of first article testing). In clause J-3 of the contract, the Government reserved the right to purchase an additional 51 units "of like items" at a price of $3,276 per unit. TMI volunteered to lower the option price to $2,950 per unit on March 18, 1981, and this price reduction was accomplished by amendment on April 1, 1981. When SPCC exercised its option on April 29, the amendment effecting the option exercise provided that the contract was modified in several ways: (1) the additional units would conform to revision "C" of military specification MIL-D-22612; (2) the additional units would be delivered at an accelerated rate; and (3) the unit price paid for the option quantity would be increased to $3,087.

Gulton protests that SPCC, in effect, used the option clause to negotiate a sole-source purchase of CFD's made to conform to revision "C" of the military specification. According to Gulton, the changes in technical specifications represented substantial changes in the terms of the basic contract and were contrary to the express provisions of the option clause. Furthermore, Gulton points out that these additional performance and equipment features were a more costly requirement and resulted in the change in price from $2,950 per unit to $3,087 per unit.

The Navy argues essentially that these modifications made in the course of exercising the option were relatively minor in nature and were, therefore, clearly within the scope of the original TMI contract. According to the Navy and TMI, the changed specifications and accelerated delivery were negotiated under the changes clause of the contract concurrent with the settlement negotiations. The increase in unit price of $137 was additional compensation to be paid TMI for the changes and was negotiated under the changes clause.

The record shows that the Navy changed the specifications from revision "B" to revision "C" for both the basic quantity and for the option quantity. Furthermore, the Navy reports that SPCC decided to make

these changes without issuing change orders and to exercise the option at the same time by issuing the April 29 amendment. In our opinion, these actions were tantamount to changing the specifications for the basic quantity pursuant to the changes clause and then exercising the option for "like items."

We have consistently held that preservation of the integrity of the competitive procurement system requires that contracting parties not make changes to contracts which have the effect of circumventing the competitive procurement statutes. This principle is violated when a modification so substantially changes the purpose or nature of a contract that the contract for which the competition was held and the contract which is to be performed are essentially different. See Memorex Corporation, supra, and cases cited therein.

The crucial issue, then, is whether the changes made in the specifications were so great that the product to be supplied by TMI under the option is substantially different from the product for which Gulton and TMI originally competed. We conclude that the changes which were made (from revision "B" to revision "C" of the specification) were within the scope of TMI's basic contract.

The record shows that the substantive changes required to change from military specification MIL-D-22612 revision "B" to "C" were: (1) the addition of a requirement that wire entering into the light sensitive cell housing enter through the horizontal side surface; (2) the unit was required to operate on type I shipboard power as well as ungrounded 115-volt alternating current, 60 hertz as required in revision "B"; and (3) the intensity of the light could be mechanically adjustable as well as electrically adjustable as required in revision "B." Gulton admits that the second change above is the primary change to the technical specifications.

Our understanding is that type I shipboard power may vary in voltage and frequency and that a CFD must be able to function properly even during such power fluctuations. Gulton contends that TMI may have modified its design to incorporate a constant voltage transformer into its existing unit in order to meet the new requirement.

In our view, the changes made were not so substantial that competition under the original solicitation was conducted on a basis which was different in nature from the contract under which TMI was to perform in supplying the option quantity. While we are not technical experts on such matters, it is our view that these changes were relatively minor. This view is bolstered by the small amount of extra payment ($137) which the technical changes and the accelerated delivery combined were to cost the Navy. Thus, the technical changes combined with the accelerated delivery required extra consideration amounting to less than 5 percent of the original cost. We also note that Gulton pointed out that a simple modification--adding a constant voltage transformer--potentially could have sufficed to meet this new requirement. In any event, Gulton bears the burden of proving that the changes amounted to a substantial change in the contract requirements. Moreover, we have held that in technical disputes a protester's disagreement with an agency's opinion does not invalidate that agency's opinion. See, for example, London Fog Company, B-205610, May 4, 1982, 82-1 CPD 418. Gulton has not persuaded us and, therefore, has not carried its burden of proof.

In these circumstances, we are not convinced that the changes went beyond the scope of the basic contract nor that the competitive bidding statutes have been circumvented. Accordingly, the protest is denied on this point.

Was Option Exercised in Accord with DAR § 1-1505?

Basically, the protester argues that, since SPCC did not make any inquiry as to what Gulton's price for the option quantity (as modified to conform to revision "C" of military specification MIL-D-22612) would be, it is clear that SPCC did not make an informal market survey to ascertain whether a better price than that offered by TMI's option could be obtained. Thus, Gulton contends that SPCC did not follow DAR § 1-1505(d), which provides methods for determining that "price" makes exercise of the option in the Government's best interest.

The circumstances under which an option may be exercised are set forth in DAR § 1-1505(c), which requires, among other things, a determination that exercise of the option is the most advantageous method

of fulfilling the Government's needs, price and other factors considered. Our Office will not object to such a determination unless applicable regulations were not followed or the determination itself is unreasonable. Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD 351.

The Navy reports that it had several reasons for determining that exercise of the option was the most advantageous method of fulfilling its needs. Concerning whether the price in TMI's option was the best price available, the Navy admits that SPCC did not make a separate, informal survey of the prices which could be obtained in April 1981, when it decided to exercise TMI's option. The Navy had performed a survey of the only known suppliers of this item--Gulton and TMI--in January and SPCC exercised the option under contract No. 1747 with Gulton in February. According to the quotations received and the actual exercise of Gulton's option in February, the best price offered by Gulton was $3,095 per unit. That price was for a much larger quantity (231 units) of CFD's which were to be to the old revision "B" specifications. Presumably, units made to revision "C" would have been more expensive since, in Gulton's own words, they include "additional performance and equipment features which make it a potentially more costly requirement." Also, based on the quotation given by Gulton in January, it is apparent that the price per unit would be higher for such a small quantity. Therefore, relying on the January market survey, SPCC determined that it was unlikely to get a lower price than that offered in the TMI option.

The Navy also was concerned about two other factors which influenced its decision to award the option to TMI. The 231-unit option which had been awarded to Gulton in February had been based upon urgency because SPCC stock was precariously low and there were over 200 "back orders" for this item. With TMI attempting to get a temporary restraining order to prevent the Navy from buying these units from Gulton, and in view of the Navy's determination that TMI was likely to succeed (or at least that the Gulton option exercise was improper), the Navy had agreed to issue a stopwork order to Gulton. Thus, the Navy determined that exercising TMI's option as it did would help resolve a costly litigation effort and at the same time fulfill an urgent requirement at an accelerated rate.

Our review of the Navy's rationale leads us to conclude that the Navy acted properly. Even though an independent, informal market survey was not conducted for this particular option exercise, we find that reliance on the January market survey was reasonable. This is especially so because that survey was fairly current and included the only known suppliers. Also, the price per unit ($3,087) under TMI's option was lower than Gulton's quote for a greater quantity of units produced to revision "B"--an admittedly less costly model. Moreover, due to the court action, the Navy reasonably was concerned with delayed procurement of an urgently needed item. Finally, we find that settlement of a costly litigation effort was also a valid basis for the Navy's determination, especially since the Navy admits it had wrongly exercised Gulton's option which led to the litigation.

In these circumstances, we conclude that the contracting agency's determination that exercise of the option was in the best interests of the Government was based upon legitimate factors and, therefore, was reasonable. Accordingly, this issue of protest is denied.

Conclusion

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States